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IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF THE CITY OF PHOENIX, THE CITY OF KINGMAN, THE CITY OF PEORIA, THE CITY OF PRESCOTT, THE CITY OF SOMERTON, THE CITY OF YUMA, AND THE LEAGUE OF ARIZONA CITIES AND TOWNS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

PETER VAN HAREN
City Attorney

SANDRA HUNTER *
Assistant City Attorney

CITY OF PHOENIX
200 W. Washington Street, Suite 1300
Phoenix, Arizona 85003-1611
(602) 262-6761

* Counsel of Record Counsel for *Amici Curiae*

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

ROBERT A. TAYLOR
City Attorney
CITY OF KINGMAN
310 N. Fourth Street
Kingman, Arizona 86401-0001
(928) 753-8091

STEPHEN M. KEMP
City Attorney
CITY OF PEORIA
8401 W. Monroe Street
Peoria, AZ 85345
(623) 773-7330

JOHN R. MOFFITT
City Attorney
CITY OF PRESCOTT
201 S. Cortez
PO Box 2059
Prescott, Arizona 86302-2059
(928) 777-1274

GERALD W. HUNT
City Attorney
CITY OF SOMERTON
330 W. 24th Street
Yuma, Arizona 85364
(928) 783-0101

STEVEN W. MOORE
City Attorney
CITY OF YUMA
One City Plaza
PO Box 13014
Yuma, Arizona 85366-3014
(928)373-5050

DAVID R. MERKEL
General Counsel
LEAGUE OF ARIZONA
CITIES AND TOWNS
1333 East Ranch Road
Tempe, Arizona 85284
(480) 839-1372

QUESTION PRESENTED

Whether the Arizona Supreme Court correctly held, in conflict with the principles of this Court and decisions of several lower courts, that the Fourth Amendment to the United States Constitution prohibits random, suspicionless drug testing of firefighters absent evidence of prior drug abuse within the fire department?

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The Cities of Phoenix, Kingman, Peoria, Prescott, Somerton, and Yuma, as political subdivisions of the state of Arizona, through their city attorneys, file this *amici curiae* brief in accordance with Rule 37.4 of the Court. The aforementioned cities as well as the League of Arizona Cities and Towns, upon written consent of both parties, also file this brief in accordance with Rule 37.2(a) of the Court.[1]

[1] A letter of consent to the filing of this brief, signed by both parties, accompanies this brief. Pursuant to this Court's Rule 37.6, the *amici* represent that no part of this brief was authored by counsel for either party, and that no person nor entity other than the *amici* made a monetary contribution towards the submission of this brief.

INTEREST OF THE *AMICI CURIAE*

The combined citizen population of the cities of Phoenix, Kingman, Peoria, Prescott, Somerton, and Yuma is 1,401,561, and the combined number of fire fighting employees is 1,749.[2] The municipalities represented all employ firefighters to serve and protect public safety and welfare. To hire and maintain an optimum firefighting force, each municipality utilizes some form of employee drug testing program, which may include a random drug testing component.[3]

The Arizona Supreme Court decision will have an enormous impact upon the drug testing procedures in all of the municipalities joining in this brief. The decision dramatically restricts municipalities' ability to ensure the fitness of firefighters in their central role as protectors of the public welfare. It places the public at great risk of harm in the name of shielding employees against minimally intrusive random drug tests. The decision, moreover, affects not only the drug testing of firefighters, but also the random testing of all municipal employees.

The cities submit this brief to illustrate the impact of the Arizona Supreme Court decision on municipal employers and firefighters, and to argue that certiorari review is needed to correct the erroneous interpretation of the United States Fourth Amendment as applied to municipalities and firefighters, to clarify the standard necessary to justify randomly testing firefighters, and to prevent that standard from being

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[2] The League of Arizona Cities and Towns represents the interests of eighty-eight cities and towns in Arizona.

[3] The following cities joining this brief ceased random drug testing of firefighters because of the Arizona Supreme Court's decision: Kingman, Phoenix, Somerton, and Yuma. All cities joining in this brief currently use random drug testing for some of their employees (police, commercial drivers, security guards, etc.) and have expressed interest in using random drug tests on firefighters.

applied more broadly to any municipal occupation subject to random drug testing.

SUMMARY OF ARGUMENT

The Arizona Supreme Court decision provides a vague standard of what evidence is necessary to justify random drug testing of firefighters under the Fourth Amendment of the United States. Despite clear direction by this Court to the contrary, the Arizona Supreme Court has declared evidence of prior drug use a mandatory element that must exist in each individual municipality before random drug testing may stand. At the same time, the decision provides little guidance as to the threshold level of evidence needed to justify the implementation and maintenance of random tests.

The Arizona Supreme Court's Fourth Amendment interpretation is not limited to the testing of firefighters. Under *its* new special needs balancing scheme, any municipal employee in any occupation could successfully challenge random drug testing where there is no evidence of prior drug abuse in his or her field. Moreover, the broad application of this new standard will prevent employers from carrying out the federally mandated random drug testing of commercial drivers' license holders in the absence of evidence of drug abuse.

To ensure firefighters' fitness for duty, municipalities nationwide have instituted drug testing procedures at various stages in the employment process. In Arizona, random drug testing of firefighters has proven effective in the detection and deterrence of drug use. Random drug testing is not only constitutional, but in this occupation is a necessary means to protect our citizens and to maintain confidence in firefighter integrity.

ARGUMENT

The Arizona Supreme Court decision runs afoul of the special needs balancing test adopted and repeatedly clarified by this Court. The Arizona Supreme Court attempted to apply

this Court's test to determine the reasonableness of the City of Mesa's (Mesa) random drug testing of its firefighters and incorrectly held "that the Program's random component falls outside the 'closely guarded category of constitutionally permissible suspicionless searches.'" (Petitioner's Appendix (Pet. App.) 16a-17a, quoting *Chandler v. Miller*, 520 U.S. 305 (1997))

I. THE FOURTH AMENDMENT'S SPECIAL NEEDS BALANCING TEST, AS MUTATED BY THE ARIZONA SUPREME COURT, REQUIRES A QUANTUM OF EVIDENCE OF PRIOR DRUG ABUSE AND CREATES A VAGUE STANDARD THAT IS IMPOSSIBLE TO IMPLEMENT

As this Court noted, "[w]hen such 'special needs' . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 at 309. A proper context-specific inquiry in this case would include an analysis of Mesa's public interest in the safety of its citizens and of the private interests of firefighters as government employees. By focusing on evidence of prior drug use, however, and declaring that "[t]he absence of evidence of drug use . . . provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk," (Pet. App. 8a) the Arizona Supreme Court has transformed the inquiry from context-specific to content driven.

This Court has repeatedly stated that evidence of prior drug use is hardly a necessary element in the balancing test, although it may shore up justification for testing. *Id.* at 319. While the Arizona Supreme Court acknowledged this Court's direction, (Pet. App. 8a-9a), it nonetheless chose to raise the existence of prior drug use from a possible factor to a mandatory prerequisite in the special needs balancing test, concluding that "the City's generalized and unsubstantiated

interest . . . is insufficient to overcome even the lessened privacy interests of the firefighters in this case." (Pet. App. 16a) In so holding, the Arizona Supreme Court has run into precisely the danger that this Court envisioned.

This Court has addressed the impossibility of "articulat[ing] a threshold level of drug use that would suffice to justify a drug testing program" and has "refuse[d] to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 836 (2002).

By making content evidence of drug abuse necessary, the Arizona Supreme Court has forced the articulation of a threshold level of prior drug abuse. Yet as this Court predicted, having demanded evidence of drug abuse, the Arizona Supreme Court was then unable to clearly articulate what quantum of drug use would suffice.

A. The Arizona Supreme Court Decision Makes It Impossible to Know What Evidence Is Necessary to Justify Random Drug Testing

The Arizona Supreme Court bemoans the absence of "evidence of even a single instance of drug use among the firefighters" nor "even an allegation or rumor that the City's firefighters used or abused drugs or alcohol." (Pet. App. 8a) Does this therefore suggest that a single instance of drug use, or the mere allegation or rumor of a single instance of drug use would satisfy the threshold level of evidence necessary to justify random drug testing?

Beginning in 1999, Phoenix instituted random drug testing in direct response to the drug related suicides of several firefighters. These deaths occurred despite the existence of other, non-random drug testing procedures such as reasonable suspicion testing. The Arizona Supreme Court's decision provides little guidance as to whether this would be sufficient

evidence of drug use within the Phoenix Fire Department to justify adding a random drug testing program.

In finding Mesa's special needs interest "unsubstantiated," the Arizona Supreme Court also points to the lack of evidence to "suggest that firefighters asked for or consented to the testing policy." (Pet. App. 8a) The genesis of Phoenix's random drug testing program was via an agreement between the United Phoenix Firefighters Association, Local 493 and the Phoenix Fire Department. The opinion below suggests this would be evidence supporting a special need, but does not reveal whether this would be constitutionally sufficient evidence.

B. The Arizona Supreme Court Is as Unclear in Stating Who May Use Evidence of Prior Drug Use as It Is in Stating What Evidence Is Sufficient

In requiring a quantum of "accidents, fatalities, injuries, or property damage that can be attributed to drug or alcohol use *by the City's firefighters*," (emphasis added) (Pet. App. 8a), the court below indicates that each individual city must present a history specific to its individual employees. Under the Arizona Supreme Court's analysis, therefore, if even one drug related death substantiated the need for random testing in Phoenix, neighboring Mesa would nonetheless be precluded from using that same incident to justify its program.

As inconceivable as it seems, the Arizona Supreme Court would demand Mesa wait until it too had a drug related suicide (or other drug related tragedy) before it could institute the same random drug testing program as Phoenix.[4] Similar

[4] In fact, Mesa's random drug testing policy for firefighters was taken from Phoenix, when a Phoenix Assistant Fire Chief transferred to Mesa. This partially explains Mesa's inability to cite its own history of drug use as justification for its policy.

reasoning was rejected by this Court in the context of airport passenger screening, stating "we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 (1989).

Moreover, using a "city" as the proper boundary within which drug use must exist before random testing is permitted is an arbitrary selection. If drug use is occurring in only one of six fire stations in a given city, perhaps random drug testing would only be justified in that station and not the entire city. The ensuing difficulty, therefore, caused by the fact specific, content driven inquiry of the Arizona Supreme Court's version of the special needs balancing test, is in defining the relevant employment sphere: state by state, city by city, district by district, station by station. In *Earls*, this Court stated "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program" and instead found it sufficient to note the existence of a student drug problem nationwide. *Earls*, 536 U.S. at 836.

C. While the Arizona Supreme Court Provides Little Clarity of What Evidence Justifies Random Testing, It Provides No Explanation of What Evidence Justifies the Continuation of Random Drug Testing

This Court has noted "When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 675. Unfortunately, the Arizona Supreme Court's analysis comes to an opposite conclusion: greater drug abuse presents a stronger argument for random testing and lesser (or no) drug abuse

presents a weaker, and indeed fatal, argument for random drug testing.

If, as the Arizona Supreme Court has stated, evidence of drug use is now a central factor in the special needs balancing test of the Fourth Amendment, even municipalities that had shown a threshold level of drug problems could be at risk of losing their right to randomly test should drug use in the target occupation cease.

The Phoenix Fire Department's random drug testing program is relatively new. From the program's start in 1999 through 2003, positive test results from random drug testing have fallen 70%. Can the argument be made that Phoenix now lacks a quantum of drug use within its firefighting force necessary to sustain the constitutional validity of continuing random testing? Is there some period of time where, if positive tests cease altogether, justification for random testing also ceases?[5] Ironically, under the Arizona Supreme Court's misaligned balancing test, the efficacy of random drug tests in deterring drug use among Phoenix firefighters could become its own undoing.

II. THE ARIZONA SUPREME COURT'S FLAWED FOURTH AMENDMENT INTERPRETATION IS IMPOSSIBLE TO RECONCILE WITH DECISIONS NATIONWIDE AND FEDERAL REGULATIONS THAT PERMIT RANDOM DRUG TESTING OF OTHER, EQUALLY OR LESS SAFETY SENSITIVE OCCUPATIONS

The Arizona Supreme Court's Fourth Amendment interpretation is not limited to the random testing of firefighters: using its analysis, all government, municipal, and public

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[5] This scenario is entirely possible. Consider the Phoenix Police Department. Phoenix instituted the random drug testing of its police force in 1991. In the last five years, Phoenix police officers were subjected to 6,977 random drug tests, producing no positive tests.

random drug testing programs are at risk where there is no evidence of prior drug use within the targeted occupation.

A. If the Arizona Supreme Court's Misaligned Balancing Test Precludes the Random Testing of Firefighters, Then It also Precludes the Random Testing of Law Enforcement Occupations That Possess Equivalent Safety Sensitive Traits

If being positioned to cause even a single incident of grave public harm, carrying firearms, investigating crimes, handling drugs, or needing to be mentally and physically fit are what makes an occupation safety sensitive enough to provide government with compelling interests sufficient to overcome the privacy interests of its employees, then firefighters, who share all of these traits at least some of the time, must also be sufficiently safety sensitive to permit random drug testing.

Law enforcement responsibility is a common factor shared by customs agents, correctional guards, and police officers; all occupations that the courts have held sufficiently safety sensitive to establish a special need to drug test.[6] Firefighters likewise take on some law enforcement duties in the performance of their jobs. As the first responders to overdose calls, firefighters are charged with searching for drugs and bringing them to hospitals to identify what an individual attempting suicide may have ingested.[7] Firefighters are also charged

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[6] *See, e.g., Von Raab*, 489 U.S. 656 (1989) (customs agents); *Hansen v. California Dept. of Corrections*, 920 F.Supp. 1480 (N.D. Cal. 1996) (correctional guards); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989) (police); *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police); *National Treasury Employees Union, et al. v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (police).

[7] In a one year period ending April 30, 2004, Phoenix firefighters responded to 3,316 calls regarding reported overdoses.

with assisting in confiscating illegal drugs involved in the commission of crimes and turning them over to the police. Some firefighters, moreover, are more law enforcement officers than fighters of fire: Phoenix arson investigators are firearms carrying, sworn officers, who spend the majority of their time investigating fire related crimes.

Unlike other employees whose job functions occur mostly in an office setting, and whose decisions and actions are insulated from the public, officers' job functions occur primarily in direct contact with the public. In this respect, officers and firefighters are equally matched. As with other highly sensitive positions, firefighters so directly serve public safety that a drug impaired member poses an immediate threat to the lives of the citizenry, such "that a single slip-up . . . may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs." *Harmon v. Thornburgh*, 878 F.2d. 484, 491 (D.C. Cir. 1989).

In an emergency, there is neither time nor opportunity to second guess a firefighter's or officer's choices and abilities; we instead trust that he arrives on scene with complete mental and physical fortitude to see the situation through to its best possible conclusion. To give us this trust in their abilities, employees in both occupations should "expect intrusive inquiries into their physical fitness for those special positions." *Von Raab*, 489 U.S. at 672.

In *Von Raab*, this Court recognized that government has a compelling interest not only in ensuring the physical fitness of customs agents, but also in ensuring their "unimpeachable integrity and judgment." *Id.* at 670. Customs employees "may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service." *Id.* at 669.

Like customs workers, firefighters' special position and expertise makes them vulnerable to bribes, blackmail, and other malfeasance. Today's firefighters have intimate knowledge of drugs, regularly using this expertise during the course of their duties to identify harmful drug use and administer helpful drug treatment. Firefighters also have ready access to a laundry list of drugs, stored at the fire station for use by firefighters and other emergency medical personnel.[8] If firefighters, because of their own drug use, are "unsympathetic to their mission" of safeguarding the public, then the municipalities face the risk of irreparable harm to their citizenry.[9] *Id.* at 670.

Given that firefighters share many of the traits that make customs agents, corrections officers, and police officers safety sensitive enough to provide government with a compelling interest in drug testing, it is clear that if the Arizona Supreme Court's decision is permitted to stand, all government employers in Arizona now face the loss of the right to randomly test these other occupations absent evidence of drug problems in their individual arenas.

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[8] Drugs accessible at a Phoenix fire station include: Adenosine, Albuterol, Aspirin, Atropine Sulfate, Bretyliam Tosulate, Calcium Chloride, Dextrose, Diazepam, Diphenhydramine HCL, Dopamine HCL, Epinephrine, Furosemide, Glucagon, Lidocaine IV, Methylprednisolone, Morphine Sulfate, Nalozone, Neosynephrine, Nitrostat Tablets, Oxytocin, Sodium Bicarbonate, Thiamine HCL, Verapamil.

[9] An example of the cloud that can envelope a drug abusing firefighter, drawing into question his integrity and judgment comes from recent newspaper accounts of arson for hire at the hands of several area firefighters, two of whom tested positive during random drug tests. Regardless of the outcome of any criminal charges, the integrity of those firefighters and public confidence in their cities' fire departments has been damaged by the drug connection.

B. The Broad Brush of the Arizona Supreme Court's Interpretation Leads to Inevitable Conflict With Nationwide Court Decisions Approving of Random Drug Testing in Occupations That Are Far Less Safety Sensitive Than Firefighting

Horse racing personnel, school custodians, and airport air cooling and heating maintenance mechanics have all been considered by courts to be sufficiently safety-sensitive to merit random testing.[10] This is because the courts properly weighed the invasiveness of drug testing against the interests of public safety, using the presence or absence of prior drug abuse as merely a factor to place on either side of the scale. Using the Arizona Supreme Court's balancing test, however, these less safety-sensitive occupations would surely fail to justify random testing in the absence of an occupational drug history.

School custodians in Arizona would not face the same random tests permitted of custodians in Louisiana. The Fifth Circuit in *Aubrey* approved random drug testing, declaring that, even without evidence of a custodial drug abuse problem, school custodians were "considered safety sensitive because of the handling of potentially dangerous machinery and hazardous substances in an environment including a large number of children ranging in age from three to eleven." *Aubrey*, 148 F.3d at 564.

Firefighters engage in all of those custodial activities and more. Firefighters aren't simply present near children, but lay hands on them in the performance of a rescue or

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[10] *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir.1991) (horse racing jockeys); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986) (horse racing jockeys and personnel); *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school custodians); *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137 (App. 1993) (air cooling and heating maintenance mechanics).

emergency medical service. Beyond ensuring clean school environments, we entrust firefighters to ensure safe home environments for children, going so far as to permit firefighters to forcibly enter homes without consent. The hazardous substances custodians work with in the school setting are multiplied in the duties of firefighters, who respond to hazardous material spills, secure possible anthrax mail, or investigate suspicious and potentially lethal odors. Finally, the dangerous machinery custodians control are surely more benign compared to the multi-ton ladder trucks, fire engines, and rescue vehicles driven at break-neck speeds, with legal authority to disobey traffic laws, through city streets. If the school board of Lafayette Parish needed no evidence of custodial drug use, but was permitted random drug testing largely on the safety-sensitive nature of a school custodian's duties, then one is left to wonder why the clearly more safety sensitive occupation of firefighter merits a requirement of evidence of prior firefighter drug use.

C. The Arizona Supreme Court Decision Conflicts With Federal Regulations Mandating Random Drug Testing in Areas Such as Commercial Driving Occupations

In Arizona, municipalities use random drug tests on their commercial vehicle drivers. Random tests are utilized, not because of any evidence of drug use in given municipalities, but because random drug testing of commercial driver's license (CDL) holders is federally mandated.[11] CDL holders are subject to random drug testing because of the potential for great damage at the hands of drug impaired drivers of large commercial vehicles. Noteworthy is the lack of any federal

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[11] The Omnibus Transportation Employee Testing Act mandated regulations for drug testing transportation employees. 49 U.S.C. § 5331. Following this mandate, the Federal Motor Carrier Safety Administration dictated the random drug testing of all commercial driver's license (CDL) holders in each state or municipality. 49 C.F.R. 383.3 (2003).

regulation requiring evidence of drug history as a prerequisite to enforcing the federal directives.

Arizona's employers are now caught between obeying the Arizona Supreme Court's interpretation of the Fourth Amendment and following federally mandated random drug testing requirements for CDL holders. A City of Peoria bus driver could attack that city's random drug testing of mass transportation employees, citing the lack of evidence of drug use within the City of Peoria's bus driving population. Under the Arizona Supreme Court's Fourth Amendment special needs balancing test, the lack of evidence would certainly tip the scales against the right to test those employees.[12]

III. CONTRARY TO THE ARIZONA SUPREME COURT'S FINDING, RANDOM TESTING IS LESS INVASIVE AND MORE EFFECTIVE THAN OTHER FORMS OF TESTING IN DETECTING AND DETERRING DRUG ABUSE AMONG FIREFIGHTERS CHARGED WITH THE PROTECTION OF THE PUBLIC

Across the nation, the role of firefighters has expanded exponentially. Firefighters are paramedics and rescue workers, trained to thrive under pressure, permitted to invade our homes, and trusted to administer life saving care. They respond to calls involving criminal acts, often taking on law enforcement responsibilities. Firefighters are also part of this nation's line of defense against terrorism, as evidenced by their central role in responding to 9/11, the World Trade Center bombing, and the bombing of the Oklahoma Federal

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[12] If the random drug testing of CDL holders was found to be protected by the Fourth Amendment, the Arizona Supreme Court's decision would produce an even more nonsensical result: without needing a history of drug abuse, the City of Yuma can test drivers of 21,300 lb. street sweepers, but cannot test drivers of 60,360 lb. ladder trucks or 39,800 lb. fire engines.

Building. Once existing solely to combat fires, a firefighter now part fighter of fire, doctor, officer, and soldier.[13]

Entwined with the expanding role of firefighter is expanding connection to drugs. As this Court noted, "dr abuse is one of the most serious problems confronting c society today. There is little reason to believe that Americ workplaces are immune from this pervasive social problem *Von Raab*, 489 U.S. at 674. In firefighting, the line betwe outside society and inside workplace is obliterated: a fi fighter's job takes him into America's homes and a fi fighter's home (the fire station) is also his workplace.

Both living at a fire station and while on call in t community, firefighters have constant exposure and access drugs of all kind. They face the relentless temptation taking drugs as an easy way to deal with the highly taxi physical and mental demands of firefighting: steroids to ke in shape, stimulants to deal with long hours and non-standa work schedules (such as multiple day, extended hour shi battling forest fires), depressants to take the edge o adrenaline highs from firefighting, and alcohol to dull t stress of life saving responsibilities in life endangeri circumstances.

As firefighters shoulder ever increasing responsibility the public, so their municipal employers bear ever increasi responsibility to ensure firefighters' fitness for duty. In t face of firefighters' constant exposure to drugs, it natural follows that employers have instituted measures to constant test for drug abuse.

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[13] In fact, firefighters spend far more time on emergency medi service (EMS) calls than on fire calls. In Phoenix, eighty percent of ca for service are for EMS, with the remaining twenty percent split betwe calls for fire and everything else, from hazardous chemical spills rescuing cats in trees.

A. Random Testing Is Hardly as Dangerously and Substantially Invasive as the Arizona Supreme Court Believes

Although the Arizona Supreme Court found that "[Mesa] has designed its Program to reduce its intrusion upon the firefighters' privacy interests," (Pet. App. 12a-13a), it nonetheless found the very nature of random tests, in "preclud[ing] any advance notification" to be highly intrusive, creating inherent "fear and surprise." (Pet. App. 15a) This Court has recognized, however, that with the proper safeguards, the randomness of a drug test causes little more fear and surprise than the prospect of taking a scheduled drug test. *See, e.g.*, *Earls*, 536 U.S. at 822.

Courts have found that the "randomness" of a test merely adds "some weight to the 'invasion of privacy' side of the Fourth Amendment balance," *Bluestein v. Skinner*, 908 F.2d 451, 456-6 (9th Cir. 1990), and is simply "a relevant consideration [that] in a particularly close case . . . would tip the scales." *Harmon*, 878 F.2d at 489. What negligible fear and surprise a random test might cause a normal employee, moreover, could hardly be a concern to firefighters who face far greater terror and uncertain fate every time the siren, randomly and without notice, rings and they board an engine to race into unknown calamity and peril.

The Arizona Supreme Court's great concern, that random testing subjects firefighters to "continuous government scrutiny," and "raises the specter of the 'unsettling show of authority,'" is also overblown. (Pet. App. 15a-16a) A firefighting applicant faces the future with the expectation that there will be testing for pre-employment qualification, during probation, upon accident or incident, and upon reasonable suspicion. Faced with the routine plethora of tests, one additional type of drug test should add no more or less expectation, nor should it add any additional burden to the normal duties of a firefighter. As a condition of their

employment, firefighters consent to this regimen of testing. Having consented, it cannot be seriously maintained that such tests violate the Fourth Amendment.

While this Court has repeatedly held that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 (1989), the Arizona Supreme Court still counted against Mesa its inability to show "that these [non-random] testing alternatives fail to deter and detect drug use among the City's firefighters." (Pet. App. 8a)

B. Random Drug Testing of Firefighters Has Proven More Effective in Detecting and Deterring Drug Abuse Than Other Forms of Testing

Like Mesa, Phoenix employs drug testing of firefighters as a prerequisite to employment, during the probationary first year, upon work-related accidents, upon reasonable suspicion, and on a random basis. All of these tests are reactive, triggered after the occurrence of an event. If the non-random components of drug testing adequately detect and deter drug abuse, then random drug testing should prove redundant, finding no additional positive tests. Phoenix's multi-prong drug testing approach, however, reveals that there are still drug abusers escaping detection, finally caught during yearly random drug tests.[14]

The efficacy of a random drug testing program is proven not only by detecting drug use through positive test results, but also by the self-reported admission of drug use and/or

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[14] Despite the multiple other forms of drug testing utilized, random drug testing in the Phoenix Fire Department has detected additional positive results every year since the implementation of random drug tests in 1999.

resignation of firefighters immediately prior to the administration of random tests.[15]

It is the very nature of random tests that makes them such powerful deterrents. Random tests, "the timing of which no employee can predict with certainty," will "significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct . . . concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty." *Skinner*, 489 U.S. at 630. If random testing ceases, drug using firefighters no longer face the certainty of discovery and instead face the much smaller risk of falling under reasonable suspicion. The incentive to self-identify or resign before being caught greatly diminishes.

Without proactive, random drug tests, employers are limited to reactive drug tests. Inherent in any reactive process is the danger that the best indication of drug use may be the worst possible circumstance: the revelation of drug use after the occurrence of a catastrophic event.[16]

While testing based upon individualized, reasonable suspicion, in theory, appears to be somewhat proactive, it does not, in practice, sufficiently safeguard the public. The efficacy of reasonable suspicion testing depends upon the ability of observers to detect the signs and symptoms of drug abuse. As courts have noted, however, it is easy to miss signs of abuse as a drug impaired individual "will seldom display any outward signs detectable by the lay person or, in many cases,

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[15] In conjunction with the random drug testing program, Phoenix provides a form of amnesty for individuals who "self-identify" their drug problem. Many cities also allow firefighters to resign rather than face the revelation of drug use through testing.

[16] Confirmation that a firefighter's drug abuse contributed to the slow and painful burning death of a child is small consolation to the surviving parents.

even the physician." (citation omitted) *Skinner*, 489 U.S. at 628, quoting 50 Fed.Reg. 31526 (1985).

While working and living next to one another makes fellow firefighters better situated than most to observe drug use, that same communal environment makes the reporting of observed drug use far less likely. There is a brotherhood among firefighters that creates strong bonds of trust and loyalty. As admirable as those traits are, they can have serious repercussions in the context of failure to report drug abuse.

Firefighters are fiercely independent, historically choosing to handle matters like drug abuse internally. An expectation that firefighters must "turn in" their fellow members upon individualized suspicion of drug abuse creates an adversarial process at odds with the familial relationship within a fire station. This Court has noted a similar conflict within the educational setting between a teacher's roles as "educator, adviser, friend, and parent-substitute" and a teacher's obligation "of spotting and bringing to account [student] drug use." *Vernonia School District 47 J v. Acton*, 515 U.S. 646, 664 (1995).

In a perfect world, upon seeing the signs of drug abuse, fellow firefighters would report possible drug abuse. Reasonable suspicion testing would ensue. In practice, however, individualized, reasonable suspicion testing is fraught with complications. In the end, reasonable suspicion testing fails because it relies on one firefighter to suspect the worst in another. Accusatory by nature and individually stigmatizing, reasonable suspicion testing is so vulnerable to human error and human bias that it cannot be more practicable than random drug testing, which completely eliminates the need for human accusation and treats all firefighters equally. In these respects, "testing based on 'suspicion' of drug use would not be better, but worse." *Id.* at 664.

Without random drug testing, a firefighter could escape detection until a drug induced error finally creates reasonable suspicion. This approach is unacceptable, however, where even a single drug induced error could cause catastrophic damage. Courts have recognized that drug impaired employees can cause such harm in a single train wreck,[17] airplane crash,[18] failed customs drug interdiction,[19] and are so uniquely positioned to "cause great human loss before any signs of impairment become noticeable to supervisors," *Skinner*, 489 U.S. at 628, that the safety sensitive nature of their jobs supports a compelling interest in drug testing. The harm that can be caused by a firefighter's botched response to a fire, drowning, accident, medical emergency, hazardous material spill, or bombing is equal to, if not more safety sensitive than these harms and is certainly "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628.

If the job functions of customs agents, train operators, officers, and airline employees, are so safety sensitive, and if the risk of harm to the public by the failures of those employees is so immediate and significant, as to overcome the minimal invasion of those employees' privacy interests occasioned by drug testing, then surely the position of firefighter is no less safety sensitive, and the risk of harm is no less great as to merit their random drug testing.

CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted and the Arizona Supreme Court decision should be reversed.

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[17] *Skinner*, 489 U.S. 602.

[18] *Bluestein*, 908 F.2d 451.

[19] *Von Raab*, 489 U.S. 656.

Respectfully submitted,

PETER VAN HAREN
City Attorney

SANDRA HUNTER *
Assistant City Attorney

CITY OF PHOENIX
200 W. Washington Street, Suite 1300
Phoenix, Arizona 85003-1611
(602) 262-6761

* Counsel of Record

Counsel for *Amici Curiae*